(6)

No. 96-1768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

C. ELVIN FELTNER, JR.,

Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether 17 U.S.C. § 504(c) permits or requires a jury trial in actions for statutory damages for copyright infringement.

2. Whether the Seventh Amendment to the United States Constitution guarantees the right to a jury trial in actions for statutory damages for copyright infringement under 17 U.S.C. § 504(c).

PARTIES TO THE PROCEEDINGS

C. Elvin Feltner, Jr. was defendant-appellant below and is the petitioner in this Court.

Krypton Broadcasting of Birmingham, Inc., Krypton Broadcasting, Inc., Krypton International Corporation, Krypton Broadcasting of Ft. Pierce, Inc., Krypton Broadcasting of Jacksonville, Inc., North Florida 47, Inc., WTWV, Inc., Daniel S. Dayton, and Alfred F. DeCuir were defendants below. Krypton International Corporation was also an appellant below on issues unrelated to the question presented here. Pet. App. 2a n.2.

Columbia Pictures Television, Inc. was the plaintiff-appellee below and is the respondent in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. THE COPYRIGHT ACT GUARANTEES THE RIGHT TO A JURY TRIAL IN ACTIONS TO ASSESS STATUTORY DAMAGES UNDER SECTION 504(c)	10
II. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT TO A JURY TRIAL ON ALL ISSUES PERTAINING TO THE IMPOSITION OF STATUTORY DAMAGES UNDER SECTION 504(c)	21
A. Actions For Copyright Infringement Seeking Statutory Damages Were Historically Tried In Courts Of Law	24
B. Statutory Damages Under Section 504(c) Are Not An Equitable Remedy	30
C. The Right To A Jury Determination Extends To All Issues Pertaining To The Imposition Of Statutory Damages Under Section 504(c)	37

TABLE OF CONTENTS—Continued

	Page
1. Number of Infringements	39
2. Willfulness and Innocence	40
3. Amount of Damages	41
CONCLUSION	46

TABLE OF AUTHORITIES

	Page
CASES:	
Arnstein v. *Porter*, 154 F.2d 464 (2d Cir. 1946)	25
Atlas Roofing Co. v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977)	44
Atwill v. *Ferrett*, 2 F. Cas. 195 (S.D.N.Y. 1846)	27
Backus v. *Gould*, 48 U.S. (7 How.) 798 (1849)	31, 39, 43
Bailey v. *United States*, 116 S. Ct. 501 (1995)	11
Baltimore & Carolina Line v. *Redman*, 295 U.S. 654 (1935)	37
Bank of Hamilton v. *Dudley's Lessee*, 27 U.S. (2 Pet.) 492 (1829)	41-42
Barry v. *Edmunds*, 116 U.S. 550 (1886)	43, 44
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959)	19, 36
Beckford v. *Hood*, 7 Term Rep. 616, 101 Eng. Rep. 1164 (K.B. 1798)	27
Blunt v. *Patten*, 3 F. Cas. 763 (S.D.N.Y. 1828)	37
Bob Jones University v. *United States*, 461 U.S. 574 (1983)	18
Bolles v. *Outing Co.*, 175 U.S. 262 (1899)	31
Bowsher v. *Synar*, 478 U.S. 714 (1986)	30
Brady v. *Daly*, 175 U.S. 148 (1899)	17, 32-33
Browning-Ferris Industries of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1991)	46
Callaghan v. *Myers*, 128 U.S. 617 (1888)	29
Cass County Music Co. v. *C.H.L.R. Inc.*, 88 F.3d 635 (8th Cir. 1996)	*passim*
Chappell & Co. v. *Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957)	19
Chauffeurs, Teamsters & Helpers, Local No. 391 v. *Terry*, 494 U.S. 558 (1990)	24, 30, 36
Colburn v. *Simms*, 2 Hare 543, 67 Eng. Rep. 224 (1843)	27, 35
Colgrove v. *Battin*, 413 U.S. 149 (1973)	37, 38
Company of Stationers v. *Parker*, Skinner 233, 90 Eng. Rep. 107 (K.B. 1681)	26

TABLE OF AUTHORITIES—Continued

Page

Company of Stationers v. *Seymour*, 1 Mod. 257, 86 Eng. Rep. 865 (K.B. 1677) 26
Curtis v. *Loether*, 415 U.S. 189 (1974) ..... *passim*
Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962) 25, 36
Davis v. *Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) 39
Dimick v. *Schiedt*, 293 U.S. 474 (1935) 23, 40, 42, 43
Donaldson v. *Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (K.B. 1774) 26, 27
Douglas v. *Cunningham*, 294 U.S. 207 (1935) 33
Dwight v. *Appleton*, 8 F. Cas. 183 (S.D.N.Y. 1843).. 31, 40, 43
Fitzgerald Publishing Co. v. *Baylor Publishing Co.*, 807 F.2d 1110 (2d Cir. 1986) 34
F.W. Woolworth Co. v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952) 33, 34, 35
Galloway v. *United States*, 319 U.S. 372 (1943) 22
Gnossos Music v. *Mitken, Inc.*, 653 F.2d 117 (4th Cir. 1981) 5
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 23, 35, 44
Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) 14
Huckle v. *Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763) 44
Hudson & Goodwin v. *Patten*, 1 Root 133 (Conn. Super. Ct. 1789) 28, 43
Jacob v. *City of New York*, 315 U.S. 752 (1942) 23
Jewell-LaSalle Realty Co. v. *Buck*, 283 U.S. 202 (1931) 16, 18
Jones v. *New York Guaranty & Indemnity Co.*, 101 U.S. (11 Otto) 622 (1879) 31
Kennon v. *Gilmer*, 131 U.S. 22 (1889) 42
L.A. Westermann Co. v. *Dispatch Printing Co.*, 249 U.S. 100 (1919) 16
Livingston v. *Woodworth*, 56 U.S. (15 How.) 546 (1853) 35
Lorillard v. *Pons*, 434 U.S. 575 (1978) 10, 13, 18

TABLE OF AUTHORITIES—Continued

Page

Lord Townshend v. *Hughes*, 86 Eng. Rep. 994 (C.P. 1677) 41, 43
Mail & Express v. *Life Publishing Co.*, 192 F. 899 (2d Cir. 1912) 19
Marsh v. *Chambers*, 463 U.S. 783 (1983) 30
Markman v. *Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996) 24, 25, 37, 40
Marvin Music Co. v. *BHC Ltd. Partnership*, 830 F. Supp. 651 (D. Mass. 1993) 34
McKinnon v. *City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984) 42
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982) 18
Millar v. *Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (1769) 25, 26-27, 32, 39
Millett v. *Snowden*, 17 F. Cas. 374 (S.D.N.Y 1844) 39, 43
Milwaukee & St. Paul Ry. v. *Arms*, 91 U.S. (1 Otto) 489 (1875) 41
Missouri Pac. Ry. v. *Humes*, 115 U.S. 512 (1885) 43-44
Monessen S.W. Ry. v. *Morgan*, 486 U.S. 330 (1988) 15
Moskal v. *United States*, 498 U.S. 103 (1990) 11
Pacific Mutual Life Insurance Co. v. *Haslip*, 499 U.S. 1 (1991) 14, 43
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 21
Parsons v. *Bedford*, 28 U.S. (3 Pet.) 433 (1830) 23
Raydiola Music v. *Revelation Rob, Inc.*, 729 F. Supp. 369 (D. Del. 1990) 20
Reed v. *Carusi*, 20 F. Cas. 431 (D. Md. 1845) 39, 43
Ross v. *Bernhard*, 396 U.S. 531 (1970) 24, 44
Sayre v. *Moore*, 1 East 360 (K.B. 1785) 37
Scott v. *Shepard*, 2 Wils. 403, 95 Eng. Rep. 1124 (K.B. 1773) 43
Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) 35

TABLE OF AUTHORITIES—Continued

	Page
Sibley v. *Fulton Dekalb Collection Service*, 677 F.2d 830 (11 Cir. 1982)	14
Sid & Marty Krofft Television Productions, Inc. v. *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977)	5, 11
Smyth Sales, Inc. v. *Petroleum Heat & Power Co.*, 141 F.2d 41 (3d Cir. 1944)	42
Sparf v. *United States*, 156 U.S. 51 (1895)	40
Stevens v. *Gladding*, 58 U.S. (17 How.) 447 (1854)	29, 31
Tull v. *United States*, 481 U.S. 412 (1987)	*passim*
Video Views, Inc. v. *Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991)	5, 36
Warner Bros., Inc. v. *Dae Rim Trading, Inc.*, 877 F.2d 1120 (2d Cir. 1989)	34
Wheaton v. *Peters*, 33 U.S. (8 Pet.) 591 (1834)	26, 27
Wilkes v. *Wood*, Lofft. 1, 98 Eng. Rep. 489 (K.B. 1763)	34, 41, 44
Wooddell v. *International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93 (1991)	24
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Const. art. I, § 8, cl. 8	15
U.S. Const. amend VII	*passim*
8 Anne ch. 19 (1710)	26, 29, 31
17 U.S.C. § 504(c)	*passim*
28 U.S.C. § 1254(1)	1
29 U.S.C. § 626(b)	13
42 U.S.C. § 3612	13
Act of May 31, 1790, ch. 15, 1st Cong., 2d Sess., 1 Stat. 124	29, 31
Act of Feb. 15, 1819, ch. 19, 15th Cong., 2d Sess., 3 Stat. 481	29
Act of Aug. 18, 1856, ch. 169, 34th Cong., 1st Sess., 11 Stat. 138	16
Act of July 8, 1870, ch. 230, 41st Cong., 2d Sess., 16 Stat. 198	16

TABLE OF AUTHORITIES—Continued

	Page
Act of January 6, 1897, ch. 4, 54th Cong., 2d Sess., 29 Stat. 481	16
Act of Mar. 4, 1909, ch. 320, 60th Cong., 2d Sess., 35 Stat. 1075	17, 29, 33
Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-62, ch. 9, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-914)	20
Va. Const. art. 1, § 11	22
LEGISLATIVE MATERIALS:	
Cong. Globe, 34th Cong., 1st Sess. 1643 (1856)	16
H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909)	17
H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976)	20
H.R. Rep. No. 781, 98th Cong., 2d Sess. (1984)	20
S. Rep. No. 352, 100th Cong., 2d Sess. (1988)	33
RULE:	
Fed. R. Civ. P. 52(a)	5
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TABLE OF AUTHORITIES—Continued

	Page
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The Writings of Thomas Jefferson (Washington ed. 1861)	22

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 106 F.3d 284 and reprinted at Pet. App. 1a. The order of the District Court awarding judgment to respondent is unreported and is reprinted at Pet. App. 21a. The order of the District Court denying petitioner's motion for a jury trial was rendered orally; the docket entry evidencing that ruling is reprinted at Pet. App. 24a. The order of the District Court granting summary judgment in favor of respondent on the question of liability is unreported and is reprinted at Pet. App. 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1997. Pet. App. 1a. The petition for certiorari

was filed on May 6, 1997, and was granted on September 29, 1997. J.A. 19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 504(c) of Title 17, U.S.C., provides, in pertinent part:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware of and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.

STATEMENT OF THE CASE

Petitioner C. Elvin Feltner, Jr. ("Feltner") owns Krypton International Corporation ("Krypton"), which in 1990 acquired three television stations in the southeastern United States. Respondent Columbia Pictures Television, Inc. ("Columbia") had licensed several television shows to the stations. Prior to Krypton's acquisition of the stations, Krypton and Columbia entered into discussions about restructuring the licensing arrangements, and protracted negotiations over such a restructuring continued from March 1990 until December 1991. During the course of those negotiations Columbia purported to terminate the licensing agreements, and filed suit when the stations—relying on the ongoing negotiations—continued to broadcast the programs. Columbia initially sued Feltner, Krypton, various Krypton subsidiaries, and certain Krypton officers under a variety of theories, but during the course of the litigation dropped all claims except its copyright infringement claims against Feltner. Pet. App. 2a.

The District Court entered summary judgment on liability in favor of Columbia on these claims, finding Feltner liable for copyright infringement arising from the television stations' airing of various episodes from four shows—"Who's The Boss?," "Silver Spoons," "Hart to Hart," and "T.J. Hooker." *Id.* 25a, 26a. Columbia thereupon exercised the option afforded by Section 504(c)(1) of the Copyright Act of 1976, 17 U.S.C. § 504(c)(1), and elected statutory damages in lieu of actual damages.

Under that provision, a "copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages * * * of not less than $500 or more than $20,000 as the court considers just." 17 U.S.C. § 504(c)(1). Section 504(c)(2) goes on to provide that "where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages" to not more than $100,000, while "where the infringer sustains the burden of

proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages" to not less than $200. *Id.* § 504(c)(2).

Feltner demanded a jury trial on the various issues pertinent to the assessment of damages under Section 504(c), and Columbia filed a motion *in limine* requesting that the trial judge reject Feltner's demand. R. 209. Feltner opposed that motion, arguing that he was entitled to a jury trial on the issue of statutory damages both as a matter of statutory interpretation and as a matter of constitutional right under the Seventh Amendment. R. 224. Over Feltner's objection, the District Court on December 13, 1993 granted Columbia's motion for a bench trial on the various issues pertinent to an assessment of statutory damages under Section 504(c). Pet. App. 24a.

The District Court then held a two-day bench trial at which it heard testimony from nine witnesses and considered evidence on the issues of willfulness, innocent infringement, value of the works in question, any profits gained by Feltner, and other facts pertinent to assessing damages under Section 504(c). R. 281, 283. After trial, "considering the evidence presented in Court," Pet. App. 21a, the trial judge issued an Order containing several findings. The judge first found that each episode of each television series constituted a separate work, rejecting Feltner's argument that each series was in fact a compilation of episodes and thus only one work. *See* 17 U.S.C. § 504(c)(1) ("For purposes of this subsection, all the parts of a compilation or derivative work constitute one work."). The judge further found that the airing of the same episode by different stations controlled by Feltner constituted separate violations, concluding that there had been a total of 440 acts of infringement. Pet. App. 21a-22a.

Given these findings, Feltner's potential liability to Columbia for statutory damages ranged from $88,000 to $8,800,000 in the event his infringement was found to be innocent under Section 504(c)(2), $220,000 to $8,800,000 if the infringement was found to be neither innocent nor willful, and $220,000 to $44,000,000 if it was found to be willful. The trial judge concluded that Feltner had not established that his infringement was innocent and instead that Columbia had carried its burden of proving that the infringement was willful. Pet. App. 22a-23a. Specifically noting that "[w]ith a finding of willfulness, the range of statutory damages to be awarded is from $500 to $100,000," the trial judge fixed the statutory damages at $20,000 per violation, with no explanation of the reasoning for the amount chosen. *Id.* 23a. Accordingly, the District Court awarded Columbia $8,800,000 in damages, plus attorneys' fees. *Id.*

On appeal, Feltner renewed his argument that he was entitled to trial by jury on the statutory damages issues, both as a matter of statutory interpretation and under the Seventh Amendment. *Id.* 11a. The Court of Appeals rejected both arguments. First, relying on *Sid & Marty Krofft Television Productions, Inc.* v. *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), it held that Congress did not intend for a jury to play any role in the assessment of statutory damages under Section 504(c). Pet. App. 11a-12a. The court then turned to Feltner's constitutional argument, concluding that the "Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature." *Id.* 12a. The court noted but declined to follow authority holding that the Seventh Amendment guarantees the right to have a jury assess statutory damages in copyright cases, *see id.* (citing *Cass County Music Co.* v. *C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996); *Gnossos Music* v. *Mitken, Inc.*, 653 F.2d 117 (4th Cir. 1981)), or the right to have a jury determine the issue of willfulness, *see id.* (citing *Video Views, Inc.* v. *Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991)).

The Ninth Circuit then went on to consider the District Court's findings with respect to willfulness and innocent infringement under Section 504(c)(2), noting that such findings were reviewed only for "clear error" under Fed. R. Civ. P. 52(a). Pet. App 13a. The court ruled that "Feltner's

arguments, at best, demonstrate that the facts presented to the district court were susceptible to more than one interpretation," and concluded that "we cannot say that the district court's finding was clearly erroneous." *Id.*

With respect to the District Court's "finding" (*id.* 14a) that the broadcasts of the same episodes by different stations controlled by Feltner were separate acts of infringement, subject to separate assessments of statutory damages under Section 504(c), the Court of Appeals concluded that Feltner had "failed to demonstrate that the finding was erroneous." *Id.* 15a (footnote omitted). The Ninth Circuit also upheld the trial judge's finding that each separate episode of each series constituted a separate work for purposes of calculating statutory damages, ruling that the "evidence support[ed]" the District Court's conclusion. *Id.* 17a. Finally, the Court of Appeals rejected Feltner's challenge to the amount of the award, concluding that because willful infringements were involved—"for which the maximum award is $100,000 per work infringed"—the award of $20,000 per violation was "well within the statutory limits and * * * not an abuse of discretion." *Id.* 18a.[1]

SUMMARY OF ARGUMENT

In this case, a judge assessed damages of $8,800,000 against Feltner, payable to Columbia in part to compensate it for an appropriation of its intellectual property rights. The award was rendered, moreover, on the basis of the judge's own factual findings concerning Feltner's allegedly "willful" behavior and the number of infringements at issue, with the actual amount of the award selected by the judge from a possible range of between $800 and $44,000,000. All of this

[1] Feltner also challenged the District Court's award of attorneys' fees, on the ground that the judge had failed to provide any explanation for his award. The Court of Appeals agreed that this was error, vacated the award of fees, and remanded so that the District Court could provide a reasoned explanation for its award. Pet. App. 19a. The District Court issued an order containing its explanation on April 29, 1997. R. 379.

was done over Feltner's objection that he was entitled to have a jury decide these basic issues affecting his liability for damages. Both the statute itself and the Seventh Amendment prohibit this result.

I. This Court has made clear that it will not address the applicability of the Seventh Amendment to a statutory claim without first determining whether it is "fairly possible" to construe the statute to resolve the jury trial claim. Here, the language and history of Section 504(c) confirm that Congress intended to provide a right to trial by jury under the statute. While the statute refers to the role of "the court" in awarding statutory damages, such references have been understood since at least the time of the Framing to include not only the judge but the jury as well. Indeed, this Court itself has held that a statute providing that "the court" shall award damages established a right to trial by jury. Nor does the statute's reference to "discretion" indicate that Congress intended Section 504(c) proceedings to be equitable in nature. Juries in our court system frequently exercise discretion, particularly in determining damages; a finding that the existence of discretion indicates an intent to foreclose the jury trial right would constitute a novel and unnecessarily crabbed view of the role of the jury. Thus, nothing in the language of Section 504(c) precludes an interpretation affording a jury trial.

The statute's history confirms that such an interpretation was in fact intended by Congress. The remedial scheme reflected in the current statute traces its origins to 1856, when Congress adopted a statute providing damages "as to the court shall appear to be just" for the unauthorized performance of dramatic compositions, recoverable through "an action on the case or other equivalent remedy." By providing for an action on the case—a prototypical action at law—Congress made clear that the statute itself authorized a trial by jury. When Congress enacted a general revision of the copyright laws in 1909, it made a similar remedial scheme available in all copyright actions. Shortly thereafter, the Second Circuit held that the 1909 statute afforded a jury trial for the determination of statutory damages. When Congress

again adopted a similar statutory damages provision in Section 504(c) of the Copyright Act of 1976, it gave no indication that it intended to remove this statutory right.

Accordingly, it is, at a minimum, "fairly possible" to adopt an interpretation of Section 504(c) which confirms the availability of a jury trial. This Court should endorse that interpretation and avoid the constitutional question that would otherwise be presented.

II. Even if the statute did not guarantee a jury in this case, the Seventh Amendment surely does. The right to a jury trial in civil cases was one of the most cherished protections secured in the Bill of Rights, and the Court has accordingly stressed the importance of preserving the right as it existed at common law against any infringement.

A. In this case, unlike others the Court has faced, the Court need not strain to find an ancient writ or cause of action that is more or less analogous to a modern statutory right unknown to 18th century England. To the contrary, statutory damages provisions for copyright infringement are as old as statutory copyright itself. Such provisions were included in the earliest English copyright statute, enacted in 1710; in state copyright statutes, enacted in this country before ratification of the Constitution; and in the first federal copyright statute, enacted one year *before* ratification of the Seventh Amendment. Claims under all of these provisions—including provisions in the state statutes which, like Section 504(c), authorized awards from within a range of amounts—were tried in courts of law, not courts of equity. Accordingly, the Seventh Amendment preserves the right to a jury trial for claims under Section 504(c), the modern day successor to these statutes.

B. This conclusion is confirmed by the nature of the statutory damages remedy. Damages, of course, were the quintessential legal remedy, awarded only in courts of law. Thus, the Court will find an exception to the rule that damages claims must be tried to a jury only where the relief in question has the attributes of historically equitable remedies.

Statutory damages under Section 504(c) do not. Such damages are intended to serve compensatory and punitive purposes—both of which are traditionally legal, not equitable, concerns. Statutory damages under the early English and federal statutes were characterized as penalties or forfeitures, enough standing alone to confirm their classification as legal, not equitable, remedies. These damages were also intended in part to serve as compensation, however, which solidifies their proper categorization as legal relief. The current statutory damages provisions—like their historical analogues—are plainly intended both to compensate copyright holders and to punish and deter infringers. Accordingly, just as actual and punitive damages are unquestionably legal remedies for which a jury is required, so too the Seventh Amendment guarantees the right to a jury in actions seeking statutory damages under Section 504(c).

It is of no moment that one of the factors that may be considered in the assessment of damages under Section 504(c) is the profit earned by an infringer. There is no requirement that an award of statutory damages bear any relation to such profits—the only amount a court of equity was permitted to award—and the award in this case certainly did not. Likewise, statutory damages (unlike equitable remedies) are not awarded only where the plaintiff lacks an adequate remedy at law, but rather are available at the plaintiff's election, for whatever reason. Nor are such damages merely "incidental" to injunctive relief; they are awarded separately under a separate statutory provision.

C. The Seventh Amendment right to a jury trial extends to all issues pertaining to the award of statutory damages in this case—the number of infringements, the question of willfulness or innocence, and the amount of the damages. These are all basic issues affecting liability for damages, and all historically would have been determined by a jury in an action tried in a court of law. The substance of the jury trial right would plainly be lost if it extended only to the question of liability, and left to the judge the findings necessary to fix damages anywhere within the range of $200 to $100,000 per

violation. In fact, in copyright and other actions, it has been the traditional role of juries to decide the factual questions of the number of infringements and a defendant's willfulness. Likewise, this Court has held that it is the fundamental role of the jury to determine the amount of damages in actions between private citizens, particularly where, as here, the amount is uncertain and subject to an exercise of discretion.

This case is therefore unlike *Tull* v. *United States*, 481 U.S. 412 (1987), where the Court carved out a limited exception to this general rule in circumstances involving quasi-criminal penalties payable to the government to enforce and implement a complex regulatory scheme. By contrast, the damages at issue here—payable to a private party in part as compensation for infringement of a property right—have always been within the purview of the jury to determine.

ARGUMENT

I. THE COPYRIGHT ACT GUARANTEES THE RIGHT TO A JURY TRIAL IN ACTIONS TO ASSESS STATUTORY DAMAGES UNDER SECTION 504(c)

As this Court has observed, "[b]efore initiating the inquiry into the applicability of the Seventh Amendment," it must "first ascertain whether a construction is *fairly possible* by which the [constitutional] question may be avoided." *Tull* v. *United States*, 481 U.S. at 417 n.3 (emphasis supplied; internal quotation omitted) (citing *Curtis* v. *Loether*, 415 U.S. 189, 192 n.6 (1974)). *See also Lorillard* v. *Pons*, 434 U.S. 575, 577 (1978). Presumably in light of this "cardinal principle," *Tull*, 481 U.S. at 417 n.3, the Court directed the parties to brief the statutory question in this case. J.A. 19; *see also* Pet. 7-8 n.3.

As we explain below, a construction of Section 504(c) by which the Seventh Amendment question may be avoided is more than "fairly possible." Indeed, examination of the text and history of Section 504(c) compels the conclusion that it requires jury determinations of willfulness and statutory damages. By adopting this construction, the Court can

follow the prudent course of resolving the matter without opining on the constitutional question that would otherwise be presented.

Statutory construction begins, of course, with the language of the statute. *See Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Here, Section 504(c) makes no express reference to jury determinations, but does provide for an award of statutory damages "in a sum of not less than $500 or more than $20,000 as the court considers just." 17 U.S.C. § 504(c)(1). In addition, Section 504(c)(2) provides that "the court in its discretion" may increase the maximum amount to $100,000 if "the court finds" that the infringer acted willfully, or reduce the minimum to $200 if "the court finds" that the infringer acted innocently. 17 U.S.C. § 504(c)(2).

Some courts have found that these references to "court" and "discretion" demonstrate a congressional intent that the issues pertinent to an assessment of statutory damages and willfulness be determined by the judge alone. *See, e.g., Sid & Marty Krofft Television*, 562 F.2d at 1177. While it is no doubt true that references to "the court" *may* be understood in some contexts to include only the judge presiding over a particular proceeding or courtroom, and that judges do exercise discretion on a wide range of tasks, nothing in the language of the statute at issue here compels reading its terms as a congressional command that a judge rather than a jury make the relevant determinations.

First, it is clear—and this Court has recognized—that simple statutory references to "the court" are not necessarily limited to the judge presiding over the courtroom. In common parlance at the time of the adoption of the Copyright Act of 1976, the term "court" meant, among other things, "the persons duly assembled under authority of law for the administration of justice." *Webster's Third New International Dictionary* 522 (1976). Other standard dictionaries have defined the term to include "an official assembly for the transaction of judicial business," and "a session of such a court." *Webster's Ninth New Collegiate Dictionary* 299

(1989). The "persons duly assembled under authority of law for the administration of justice" may of course include both judges and jurors, and the court system regularly "transact[s] * * * judicial business" through both offices.

Indeed, from the time of the debates on the ratification of the Constitution itself, authorities have recognized that references to a "court" are not necessarily limited to the judge but rather may encompass the judge and jury—the universe of decisionmakers in the court system. In answering the objection that references to courts in Article III of the proposed Constitution could be construed as barring juries in civil cases, the Founders expressed the view—later echoed by this Court—that such references should not be understood to refer to the judge to the exclusion of the jury.

No less an authority than John Marshall explained his view during the Virginia debates on ratification as follows:

> Does the word *court* only mean the judges? Does not the determination of a jury necessarily lead to the judgment of the court? Is there anything here which gives judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the court of the facts. When a court has cognizance of facts, does it not follow that they can make inquiry by a jury? It is impossible to be otherwise. [3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 557-558 (J. Elliott ed. 1896) [hereinafter, "*Elliott's Debates*"] (emphasis in original).]

To similar effect is the argument made during the Massachusetts debates by Thomas Dawes:

> The word *court* does not, either by a popular or technical construction, exclude the use of a jury to try facts. When people, in common language, talk of a trial at the *Court* of Common Pleas, or the Supreme Judicial *Court*, do they not include all the branches and members of such court—the *jurors*, as well as the judges? They certainly do, whether they mention the jurors expressly or not. [2 *Elliott's Debates*, *supra*, at 113 (emphasis in original).]

More recently, this Court has declined to hold that statutory references to a "court" necessarily foreclose the use of a jury to make the determinations at issue. In *Curtis* v. *Loether*, *supra*, the Court considered whether respondents were entitled to a jury in an action against them under Title VIII of the Civil Rights Act of 1968. The statute provided that " '*[t]he court* may grant as relief, *as it deems appropriate*, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages, together with court costs and reasonable attorney fees.' " 415 U.S. at 189-190 (quoting 42 U.S.C. § 3612) (emphasis supplied). Despite the language concerning "the court" granting relief "as it deems appropriate," this Court did not hold that the statute itself directed judicial, rather than jury, determinations of damages. Instead, it found "plausible arguments" for both sides of the question "from the wording and construction" of the statute. *Id.* at 192.

This Court's subsequent decision in *Lorillard* v. *Pons*, *supra*, took the next step and found the jury trial right preserved by the statute. That case also involved consideration of whether an anti-discrimination statute (the Age Discrimination in Employment Act) provided for trial by jury. The remedial provisions of the ADEA provided that " '[i]n any action brought to enforce this chapter *the court* shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter * * * .' " 434 U.S. at 579 n.5 (quoting 29 U.S.C. § 626(b)) (emphasis supplied). Examining the language and history of this provision, this Court held that "Congress intended that in a private action under the ADEA a trial by jury would be available where sought by one of the parties." *Id.* at 585. Thus, the Court in *Lorillard* interpreted the *statute* authorizing "the court * * * to grant such legal or equitable relief as may be appropriate" to provide for trial by jury, without

reaching the question whether the Constitution would require such a result in the absence of a statutory command. [2]

Second, that Section 504(c) calls for the exercise of discretion does not establish that Congress intended the pertinent determinations to be made by a judge instead of a jury. While it is no doubt true that the exercise of discretion characterized the function of the chancellor in equity, it has never been thought that any task involving the exercise of discretion is necessarily removed from the province of the jury and given to the judge. On the contrary, juries in our system make discretionary decisions every day.

For example, this Court has held that decisions concerning punitive damages "should not be committed to the *unreviewable* discretion of a jury," *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 435 (1994) (emphasis supplied), and has recognized that "[u]nder the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct." *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991). The Court has never concluded that there is anything untoward or unusual about vesting the jury with the authority to make this inherently discretionary decision.

These cases are simply modern applications of the long-standing principle, recognized in *Tull*, 481 U.S. at 422, that "[r]emedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not

[2] *See also Sibley* v. *Fulton Dekalb Collection Serv.*, 677 F.2d 830, 832-833 (11th Cir. 1982) ("It has been frequently determined * * * that the word 'court,' used in the [Fair Debt Collection Practices] Act and in the remedial portions of numerous other statutes, encompasses trial by both judge and jury rather than by judge alone. In this case, we likewise choose to interpret the word 'court' to encompass trial by both judge and jury. This interpretation serves to avoid the serious constitutional questions that would be raised under the seventh amendment if we adopted a construction of the Act that prohibited trial by jury") (footnote omitted).

courts of equity." As the *Tull* Court explained, it has never been thought that such awards are equitable merely because they are "not fixed or readily calculable from a fixed formula," but rather require the exercise of judgment and discretion. *Id.* at 422 n.7.

Even outside the punitive context, it has been recognized that decisions commonly made by juries—such as the amount of damages to award for pain and suffering—involve not simply factfinding followed by mathematical calculation but rather considerable discretion. *See, e.g., Monessen S.W. Ry. Co.* v. *Morgan*, 486 U.S. 330, 348 n.5 (1988) (pain and suffering damages "are inherently noneconomic and are established through the subjective discretion of the jury") (Blackmun, J., concurring and dissenting) (citing Dan B. Dobbs, *Law of Remedies*, § 8.1 at 548-550 (1973)).

In short, the mere fact that Section 504(c) provides for the exercise of discretion in assessing statutory damages does not establish that Congress intended the judge rather than the jury to exercise that discretion. The language of the statute thus provides no basis for concluding that Congress intended to preclude juries from determining the amount of statutory damages.

Third, in light of the facial ambiguity of the statute, it is necessary to consult other sources in the effort to determine statutory intent. Here, the best of these sources, providing a conclusive answer, is found in the historical pedigree of Section 504(c).

The Copyright Act of 1976 was the result of a nearly twenty year legislative effort to rewrite the laws "securing for limited Times to Authors * * * the exclusive Right to their respective Writings * * *." U.S. Const. art. I, § 8, cl. 8. The 1976 Act was not, however, the first federal copyright statute providing for statutory damages "as the court considers just." Its statutory damages provisions are nearly identical to those found in the 1909 Act,[3] and—as this Court has noted—the

[3] Columbia has recognized that "neither this Court nor any circuit court has concluded that the amendments in the 1976 Act

statutory damages provisions of the 1909 Act in turn trace their origins to 1856. *L.A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U.S. 100, 107-108 (1919). *See also Jewell-LaSalle Realty Co.* v. *Buck*, 283 U.S. 202, 205-207 (1931).

In that year, Congress adopted the first federal copyright statute authorizing "the court" to determine a "just" measure of damages. Act of Aug. 18, 1856, ch. 169, 34th Cong., 1st Sess., 11 Stat. 138, 139. The 1856 Act, which concerned the unauthorized performance of dramatic compositions, provided for an "action on the case or other equivalent remedy" in which damages were to be "assessed at such sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, *as to the court having cognizance thereof shall appear to be just.*" *Id.* (emphasis supplied). An action on the case, of course, was an action at law, for which a jury would be available. *See* F.W. Maitland, *The Forms of Action at Common Law* 65-67 (1963 ed.) [hereinafter, "Maitland".[4]]

The language providing for damages in an amount "as to the court shall appear to be just" was carried forward in copyright provisions protecting dramatic compositions in the revisions of 1870 and 1897.[5] There is no evidence that Congress intended in these subsequent revisions to remove the jury trial right it so clearly intended at the time of the 1856 Act. *See* Patry, *supra*, at 165-166, 169.

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changed the nature of statutory copyright damages." Opp. Cert. 8-9 n.3.

[4] The phrase "or other equivalent remedy" was added to account for the fact that civil law courts in some states would not recognize an action on the case. *See* William F. Patry, *The Right to a Jury in Copyright Cases*, 29 J. Copyright Soc'y 139, 162-163, 169 (1981) [hereinafter, "Patry"] (quoting Cong. Globe, 34th Cong., 1st Sess. 1643 (1856)).

[5] Act of July 8, 1870, ch. 230, § 101, 41st Cong., 2d Sess., 16 Stat. 198, 214; Act of January 6, 1897, ch. 4, 54th Cong., 2d Sess., 29 Stat. 481, 482.

Indeed, in *Brady* v. *Daly*, 175 U.S. 148 (1899), a case reaching this Court under the 1870 version of the statute (then found in Section 4966 of the Revised Statutes), the plaintiff—after initial proceedings in equity—sought damages under Section 4966 in, as he would, a proceeding at law. The report of the case indicates that "[a] jury trial was waived," *id.* at 151—an act that would have been quite unnecessary had there been no entitlement to a jury. In its decision, moreover, the Court rejected the claim, important for jurisdictional purposes, that Section 4966 involved a forfeiture or penalty. Instead, the Court held, "it is * * * evident that the statute seeks to provide a remedy * * * and to grant the proprietor the right *to recover damages* which he has sustained * * * ." *Id.* at 154 (emphasis supplied). Actions to recover damages were and are, of course, "the traditional form of relief offered in the courts of law." *Curtis*, 415 U.S. at 196.

In the general revision of the copyright laws in 1909, Congress extended these statutory damages beyond the area of dramatic compositions. Section 25(b) of the 1909 Act provided that in all cases of copyright infringement the plaintiff could elect "in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages, the court may, in its discretion, allow the amounts hereinafter stated." Act of Mar. 4, 1909, ch. 320, § 25(b), 60th Cong., 2d Sess., 35 Stat. 1075, 1081. The statute then set out specified amounts for infringement of various types of works, including, for example, "one hundred dollars for the first and fifty dollars for every subsequent infringing performance" of dramatic compositions—the same remedial scheme first enacted in the 1856 Act. *See* H.R. Rep. 2222, 60th Cong., 2d Sess. 16 (1909) (subsection on dramatic compositions "is a substantial reenactment of existing law"). Section 25(b) further provided that these statutory damages in total could not, in most cases, "exceed the sum of five

thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty."[6]

Against the backdrop of the previous 50 years of experience under the dramatic compositions provision, this language could only have been understood to preserve the statutory jury trial right. Congress in effect took the remedial regime that had existed for dramatic compositions—which, as we have seen, involved an action on the case in which a jury was available—and applied it to all cases of copyright infringement. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard*, 434 U.S. at 581. *See also Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601-602 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982). As Justice Frankfurter has explained, when a concept "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

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6 The drafting history of the 1909 Act—"which was the result of a series of conferences called by the Librarian of Congress," *Jewell-LaSalle Realty*, 283 U.S. at 206 n.4—suggests that this manner of imposing statutory damages was selected in order to cabin the discretion of juries. *See, e.g.*, 3 E. Fulton Brylawski and Abe Goldman, eds., *Legislative History of the 1909 Copyright Act* 235 (1976) (statement of George Haven Putnam of the American Publishers' Copyright League, at Copyright Conference, that "[w]e want to be in a position to secure a fixed payment * * * which shall be small enough to enable the jury to give us a verdict, [and] that shall be high enough to deter similar piracies. The suggestion was for a payment of $1.00 a copy with a minimum of $100 and a possible maximum of $5000"); *id.* at 241 ("I think there ought to be a maximum and minimum provision. With that the court could tell the jury that a man could not get more than $5000 in any case; and in the case of a man's accidental infringement it is hard to get the jury to set a minimum") (statement of Samuel J. Elder).

The conclusion that the 1909 Act preserved the right to a trial by jury was endorsed by the Second Circuit shortly after the statute was enacted. In *Mail & Express* v. *Life Publishing Co.*, 192 F. 899, 901 (2d Cir. 1912), the court observed that "[w]hile the language of the provision quoted [Section 25(b) of the 1909 Act] is somewhat obscure, we do not think that by the use of the word 'court' it is required that the judge acting by himself shall assess the damages when a case is presented calling for an award under the minimum damage clause." Instead, it is "the better view that the statute permits him to direct the jury to assess the damages within the prescribed amounts." *Id.*

From the time of the 1909 Act until enactment of the Copyright Act of 1976, only one other court of appeals decision squarely addressed the availability of a jury trial under the 1909 Act. In *Chappell & Co.* v. *Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957), the First Circuit rejected the plaintiff's claim that it should have been afforded a jury when seeking "in lieu of" damages. The court held that such damages were no different from actual damages, which the plaintiff had conceded "the district court as a court of equity would have been free to determine and award * * * as incidental to the relief by way of injunction against future infringements." *Id.* at 81-82.

As the Eighth Circuit recently observed, the plaintiff's concession was based on an inaccurate view of the law, as confirmed less than two years after *Chappell* in this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). *See Cass County*, 88 F.3d at 639. Long before 1976, therefore, it would have been clear that the *Chappell* decision was infirm. In fact, after *Beacon Theatres*, the First Circuit's rejection of any distinction between actual and statutory damages "actually now supports the position that damages for copyright infringement are legal and therefore trigger the right to trial by jury, whether the damages sought are actual or statutory." *Cass County*, 88 F.3d at 639. *See also* Patry, *supra*, at 181.

At the time Section 504(c) was enacted in 1976, then, Congress was acting against an historical backdrop in which statutory damages left to the discretion of "the court" had long been understood to include the right to a jury trial. From the time of the "action on the case" provided in the 1856 Act, through the 1909 Act as interpreted by the Second Circuit in *Mail & Express*, authorities indicated that a jury trial was available to determine statutory damages. As we have noted, and as respondents have conceded, it is generally understood that, so far as is pertinent here, the 1976 Act effectively reenacted the 1909 Act.[7]

In light of the language of Section 504(c), which certainly *permits* the use of a jury to determine issues related to

[7] What legislative history there is regarding the remedies provisions of the 1976 Act supports the view that a jury trial was envisioned. The various reports on the bill enacted into law speak, as does the statute itself, of statutory damages being awarded by "the court." *See, e.g.*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 162 (1976). In discussing the actual damages provisions, however, the reports also state that "the court" will have to make the necessary apportionment between profits attributable to infringement, which are recoverable, and those attributable to other factors, which are not. *Id.* at 161. "Thus, the word 'court' is used in the same report in connection with actual damages, a jury issue." *Raydiola Music* v. *Revelation Rob, Inc.*, 729 F. Supp. 369, 372 (D. Del. 1990).

One other source is worth noting. When Congress enacted the Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, ch. 9, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-914), the House Judiciary Committee noted that "[s]ection 911(c) provides statutory damages, in terms generally analogous to 17 U.S.C. § 504(c), but the discretionary amount that can be awarded to the plaintiff is raised to $250,000. * * * In using the term 'court' in Section 911(b) and (c) it is the intent of the Committee, *as under 17 U.S.C. § 504(c)*, that there be a right to a jury where requested." H.R. Rep. No. 781, 98th Cong., 2d Sess. 27 (1984) (emphasis supplied). While this statement cannot speak to the intent of those Congresses that enacted previous legislation, it is certainly probative that a Congress using essentially the same language as that found in the 1909 and 1976 Acts believed it had secured a statutory right to trial by jury.

statutory damages, and its history, under which it has long been the case that jury trials were available, it is clear that "a construction of the statute is *fairly possible* by which the [constitutional] question may be avoided." *Tull*, 481 U.S. at 417 n.3 (emphasis supplied; internal quotation omitted). Consistent with the "cardinal principle" that resolution of constitutional questions should be avoided where possible, *id.*, this Court should hold that Section 504(c) itself preserves to the parties the opportunity for trial by jury.

II. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT TO A JURY TRIAL ON ALL ISSUES PERTAINING TO THE IMPOSITION OF STATUTORY DAMAGES UNDER SECTION 504(c)

The Seventh Amendment to the Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." Any consideration of the scope and applicability of the Amendment must begin with an appreciation of the surpassing importance the Framers attached to this right. They considered it a vital "bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

The abrogation of the right to trial by jury was in fact one of the American colonists' principal grievances against the Crown, specifically included among the indictments of George III in the Declaration of Independence. *See The Declaration of Independence* para. 20 (1776) ("For depriving us, in many cases, of the Benefits of Trial by Jury"). Perhaps the objection to the proposed Constitution that gained the most currency, "well-nigh preventing its ratification," was its failure to guarantee the right to trial by jury in civil cases. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1763 (5th ed. 1891). Hamilton felt compelled in *The Federalist* to assure those considering ratification that the Framers intended no diminishment of that right:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. [*The Federalist* No. 83, at 499 (Clinton Rossiter ed. 1961).]

For his part, Jefferson regarded the right as "the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861) (quoted in *Galloway* v. *United States*, 319 U.S. 372, 397 (1943) (Black, J., dissenting)). James Iredell of North Carolina, campaigning for ratification of the Constitution, argued that any representative who, out of "folly or insanity," sought to infringe the right "soon would be taught the consequence of sporting with the feelings of a free people." James Iredell, Marcus, *Answers to Mr. Mason's Objections to the New Constitution* (1788), in 5 *The Founders' Constitution* 357-358 (Philip B. Kurland & Ralph Lerner eds. 1987). To Patrick Henry, trial by jury was "the best appendage of freedom." 3 *Elliott's Debates*, *supra*, at 324.[8] In their unbridled devotion to the right of trial by jury, the Framers merely echoed Blackstone—their primary source on the law—who viewed the right as "the glory of the English law," and "the most transcendent privilege which any subject can enjoy." 3 William Blackstone, *Commentaries* *379 (1768).

In ratifying the Constitution, seven of the original thirteen States did so with the strong recommendation that it be promptly amended to include a Bill of Rights. Six of those seven states urged a specific guarantee of the right to trial by

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[8] Every one of the thirteen original States guaranteed the right to trial by jury—many in worshipful terms, *see, e.g.*, Va. Const., art. I, § 11 ("the trial by jury is preferable to any other, and ought to be held sacred")—making the right "probably the only one universally secured by the first American state constitutions." Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 281 (1960).

jury in civil cases.[9] That was accomplished when, with no recorded debate, the Seventh Amendment was included in the Bill of Rights.

This Court early on reaffirmed the historic significance of the right to trial by jury. *See, e.g.*, *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) ("The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.") (Story, J.). As the Court admonished in *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935), "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *See also Jacob* v. *City of New York*, 315 U.S. 752, 752-753 (1942) ("A right so fundamental and sacred to the citizen * * * should be jealously guarded by the courts.").

The test for undertaking such scrutiny in cases such as this is well-established:

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. [*Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 42 (1989) (quotation omitted).]

When that test is applied to this case, the answer is readily apparent: just as actions seeking statutory damages for copyright infringement were tried before juries in courts of law in the 18th century, so the Seventh Amendment requires that their modern-day counterparts be tried to juries today if either party desires. It is simply inconceivable that the Framers who attached such importance to the right preserved by that amendment would have countenanced the imposition

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[9] *See* 2 *The Debate on the Constitution* 538 (Bernard Bailyn, ed. 1993) (ratification resolution of New York); 549 (Massachusetts); 551 (New Hampshire); 555 (Maryland); 560 (Virginia); 567 (North Carolina).

by a judge of a damage award of nearly $9,000,000, based on specific factual findings after trial on disputed evidence and intended in part to compensate a copyright holder for the infringement of a property right.[10]

A. Actions For Copyright Infringement Seeking Statutory Damages Were Historically Tried In Courts Of Law

Although this Court has on occasion characterized the first part of the Seventh Amendment test—the comparison with 18th century English actions—as "abstruse," *Ross* v. *Bernhard*, 396 U.S. 531, 538 n.10 (1970), it is also true that in some cases the answer is "easy" because of clear historical evidence. *Markman* v. *Westview Instruments, Inc.*, 116 S. Ct. 1384, 1389 (1996). *See Chauffeurs, Teamsters and Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 593 (1990) ("The historical test, in fact, resolves most cases without difficulty.") (Kennedy, J., dissenting).

This is such a case. Most of the Court's recent Seventh Amendment cases have involved modern statutory rights unknown to 18th century England, requiring the Court to strain to find "analogous" common law causes of action.[11] There is no need to do so here. Statutory damages for copyright infringement have existed since the first English copyright statute was enacted in 1710, and the historical record is clear that such claims were tried in courts of law,

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[10] *See* 2 William F. Patry, *Copyright Law and Practice* 1170 n.384 (1994) ("It is simply incredible that an award of up to $100,000 per work can be made based upon a finding of willfulness—a clear fact issue—without a jury.").

[11] *See, e.g., Wooddell* v. *International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991) (alleged violations of union's duties under Labor Management Relations Act and Labor-Management Reporting and Disclosure Act); *Terry*, *supra* (alleged violation of union's duty of fair representation under National Labor Relations Act); *Granfinanciera*, *supra* (action to rescind fraudulent preference under Bankruptcy Act); *Tull*, *supra* (government's claim for penalties under Clean Water Act); *Curtis*, *supra* (claim under Title VIII of Civil Rights Act).

not courts of equity. Accordingly, it follows that Feltner has a Seventh Amendment right to have a jury decide Columbia's claim for statutory damages under the present-day statute.

Under Anglo-American law, copyright has existed as a common law or statutory right for more than 300 years. The early common law right was derived from concepts of natural law—recognizing the fruits of one's intellectual labor as his property.[12] Actions seeking damages for infringement of common law copyright—like actions seeking damages for invasions of other property rights—were tried in courts of law. *See Millar* v. *Taylor*, 4 Burr. at 2396, 98 Eng. Rep. at 251 (Common law copyright "can only be violated by another's printing without the author's consent: which is a civil injury. The only remedy is the same; *by an action upon the case, for damages*, or a bill in equity for specific relief.") (Mansfield, J.) (emphasis supplied). As noted, an "action on the case" was a form of action tried exclusively in courts of law, not equity. *See supra* at 16.

Given copyright's history as a legal, not equitable, right, and the fundamentally legal nature of the remedy of actual damages, there can be no question that present-day infringement actions seeking *actual* damages must be tried to a jury.[13] The question in this case, then, is whether the remedy of statutory damages—which the plaintiff may elect "instead of actual damages and profits" at its sole discretion—

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[12] *See Millar* v. *Taylor*, 4 Burr. 2303, 2398, 98 Eng. Rep. 201, 252 (K.B. 1769) (common law copyright derived from the principle "that an author should reap the pecuniary profits of his own ingenuity") (Mansfield, J.); 2 William Blackstone, *Commentaries* *405 (1768) (common law copyright derived from ancient law of "occupancy"); *The Federalist* No. 43 at 271 (Clinton Rossiter, ed. 1961) ("The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law.") (James Madison).

[13] *See Markman*, 116 S. Ct. at 1389 ("[T]here is no dispute that infringement cases today must be tried to a jury, as their predecessors were more than two centuries ago."); *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 477 (1962) (An action for damages for trademark infringement is "subject to cognizance by a court of law."); *Arnstein* v. *Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

somehow converts this traditionally legal claim into an equitable one.

Historical practice in England and in the United States provides a ready answer. The first English copyright statute, the Statute of Anne, was enacted in 1710 and provided that the damages for infringement would be "one penny for every sheet which shall be found in [the infringer's] custody, either printed or printing, published or exposed to sale * * *." 8 Anne ch. 19 (1710).[14]

Consistent with the earlier practice with respect to common law copyright, an action seeking statutory damages under this enactment would have been tried to a jury in a court of law.[15] As Justice Yates explained in *Millar* v. *Taylor*, *supra*, the right granted by the Statute of Anne was

> the same as a lease, a grant, or any other common-law right, whilst the term exists; and will equally intitle him

[14] Earlier statutes and royal edicts dealing with printing were not copyright statutes, but rather means of maintaining government censorship of, and monopoly control over, the press. Beginning in the early 16th century, English monarchs maintained increasing control over the press, culminating in 1557 in the granting of a printing monopoly to the Stationers Company of London. The royal decrees relating to the Stationers Company were enforced by the notorious Star Chamber prior to its demise in 1640. In 1643, Parliament began enacting licensing acts, patterned after Star Chamber decrees, which restored many of the powers of the Stationers Company. *See generally* 1 William F. Patry, *Copyright Law and Practice* 6-9 (1994). The monopoly granted by the licensing acts—in a sense a predecessor to copyright protection—was enforced in courts of law through actions for debt. *See Company of Stationers* v. *Parker*, Skinner 233, 90 Eng. Rep. 107 (K.B. 1681); *Company of Stationers* v. *Seymour*, 1 Mod. 257, 86 Eng. Rep. 865 (K.B. 1677).

[15] In England it was held that enactment of copyright statutes displaced the common law copyright. *See Donaldson* v. *Becket*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774), *overruling Millar*, *supra*. This Court has likewise held that all copyright remedies in this country are statutory. *See Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834). The term "common law copyright" is used today primarily to refer to copyright in unpublished works.

> to all common-law remedies for the enjoyment of that right. He may, I should think, file an injunction-bill to stop the printing: but I may say, with more positiveness, *he might bring an action, to recover satisfaction for the injury done him, contrary to law, under the statute.* * * * "[W]herever a statute gives a right, the party shall, by consequence have an action at law, to recover it." [4 Burr. at 2380-81, 98 Eng. Rep. at 243 (Yates, J.) (citation omitted; emphasis supplied).[16]]

See Beckford v. *Hood*, 7 Term Rep. 616, 627, 101 Eng. Rep. 1164, 1167 (K.B. 1798) ("[T]he statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it.") (Kenyon, C.J.).[17]

This practice of enforcing statutory damages through an action at law was followed in this country even before adoption of the Constitution. In 1783, the Continental Congress passed a resolution recommending that the states secure copyright protections for authors. *See* U.S. Copyright Office, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, 140 Copyright Office Bulletin No. 3 at 1 (1973) [hereinafter "*Copyright Enactments*"]. Twelve states (all except Delaware) responded by enacting copyright statutes, all of which contained statutory

[16] The precise issue in *Millar* was whether the Statute of Anne superseded the common law of copyright. In *Millar*, the King's Bench (over Justice Yates' dissent) held that the statute merely supplemented the common law remedies. As noted above (*see supra* n. 15), that decision was later overruled by the House of Lords in *Donaldson* v. *Becket*.

[17] *See also Colburn* v. *Simms*, 2 Hare 543, 564, 67 Eng. Rep. 224, 233 (Ct. Chan. 1843) (damages under Statute of Anne were enforced in "the Courts of ordinary jurisdiction * * * according to their ordinary principles"); *Millar*, 4 Burr. at 2319, 98 Eng. Rep. at 210 ("[A] bill in Chancery is not given; and consequently could not be brought upon this Act.") (Willes, J.); *Wheaton*, 33 U.S. (8 Pet.) at 697 (Thompson, J., dissenting); *Atwill* v. *Ferrett*, 2 F. Cas. 195, 198 (S.D.N.Y. 1846) ("The act of 8 Anne, c. 19, did not designate the form of action, yet no doubt was ever expressed that case was the appropriate one.").

damages provisions. *Id.* at 1-19. Seven of these statutes expressly stated that the statutory damages were to be enforced through actions at law, while the others were silent on the question.[18] *See Hudson & Goodwin* v. *Patten*, 1 Root 133 (Conn. Super. Ct. 1789) (jury trial in copyright infringement action under Connecticut statute). Importantly, the statutory damages provisions of three of these statutes (Massachusetts, New Hampshire, and Rhode Island) authorized awards between specified minimum and maximum amounts—just like present-day Section 504(c)—and all three expressly provided that recovery would be through an "action of debt." *Copyright Enactments*, *supra*, at 4, 8, 9. None of these early statutes made any reference to equity jurisdiction.

Likewise, in the first federal copyright statute—enacted one year *before* ratification of the Seventh Amendment—Congress expressly provided for statutory damages and expressly provided that such damages would be assessed in an action at law. The Copyright Act of 1790 provided that,

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[18] *Id.* at 2 (Connecticut—statutory damages for published works of double the value of copies enforceable by action "at law"); *id.* at 4 (Massachusetts—statutory damages of not less than five pounds and not more than 3,000 pounds enforceable by "action of debt"); *id.* at 8 (New Hampshire—statutory damages of not less than five pounds and not more than 1,000 pounds enforceable by "action of debt"); *id.* at 9 (Rhode Island—statutory damages of not less than five pounds and not more than 3,000 pounds enforceable by "action of debt"); *id.* at 11 (South Carolina—statutory damages of one shilling per sheet enforceable by "debt, plaint or information"); *id.* at 17 (Georgia—statutory damages for published works of double the value of copies enforceable "in due course of law"); *id.* at 19 (New York—statutory damages for published works of double the value of copies enforceable in "court of law").

Two of the statutes allowed actions in any court "of record." *Id.* at 14 (Virginia—statutory damages of double the value of copies); *id.* at 17 (North Carolina—same). Two others allowed actions in any court where the action may be cognizable. *Id.* at 7 (New Jersey—statutory damages of double the value of copies); *id.* at 10 (Pennsylvania—same). One was silent on the mode of enforcement. *Id.* at 6 (Maryland—statutory damages of two pence per sheet).

for infringement of a copyright in a published work, damages would be "the sum of fifty cents for every sheet which shall be found in [the infringer's] possession * * * *to be recovered by action of debt* in any court of record in the United States wherein the same is cognizable." Act of May 31, 1790, ch. 15, § 2, 1st Cong., 2d Sess., 1 Stat. 124, 125 (emphasis supplied).[19] For infringement of copyright in unpublished works, the statute provided for actual damages "to be recovered by a special action on the case * * * in any court having cognizance thereof." *Id.* § 6.

An action of debt and an action on the case were, of course, prototypical remedies at law for which a jury was required. *See* Maitland, *supra*, at 63-64, 65-67. Moreover, the legal nature of these damages provisions was further underscored by the fact that the Copyright Act of 1790 did not provide for equitable remedies at all.[20] Finally, any doubt about the legal nature of these damages provisions is dispelled by *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447 (1854), in which the Court held—even after Congress had provided for equity jurisdiction under the Copyright Act—that its statutory damages provisions could not be enforced through a suit in equity. *Id.* at 455. *See Callaghan* v. *Myers*, 128 U.S. 617, 663 (1888) (Court determined in *Stevens* that statutory damages provisions "cannot be enforced in a suit in equity").

This Court has stressed that the actions of the First Congress are " 'contemporaneous and weighty evidence' of the

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[19] Like the earlier Statute of Anne, *see* 8 Anne ch. 19 (1710), the first U.S. Copyright Act provided that one half of the statutory damages recovered would be paid to the United States government. Act of May 31, 1790, ch. 15, § 2, 1st Cong., 2d Sess., 1 Stat. 124, 125. This sort of provision was not completely eliminated from the Copyright Act until 1909. *See* Act of Mar. 4, 1909, ch. 320, § 25, 60th Cong., 2d Sess., 35 Stat. 1075, 1081.

[20] The law did not provide for federal court jurisdiction, and was therefore enforced in the state courts. Congress did not provide either federal or equity jurisdiction over copyright actions until 1819. *See* Act of Feb. 15, 1819, ch. 19, 15th Cong., 2d Sess., 3 Stat. 481.

Constitution's meaning." *Bowsher* v. *Synar*, 478 U.S. 714, 723 (1986) (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)). Those early actions are even more probative—if not dispositive—of the issue here, because the Seventh Amendment was specifically intended to "preserve" the right to a jury trial as it existed at the time of its ratification in 1791. The Copyright Act of 1790 confirms that the members of the First Congress understood actions for recovery of statutory damages for copyright infringement to be actions at law.

It is clear, then, that in the 18th century, copyright actions seeking statutory damages—in England and the United States—were tried before juries in courts of law. This was true not only with respect to the fixed amounts imposed by the Statute of Anne and the Copyright Act of 1790, but also with respect to statutes that authorized awards of damages within a set range—direct predecessors of Section 504(c). As we have noted (*see supra* at 28), three states had enacted such statutes prior to the ratification of the Seventh Amendment, and all three expressly provided that the damages within the set range were to be enforced through actions at law.

Thus, the historical evidence strongly supports, if not compels, a holding that a claim for statutory damages under Section 504(c) is a legal claim triable to a jury upon demand.

B. Statutory Damages Under Section 504(c) Are Not An Equitable Remedy

Given that there are direct historical analogues to Section 504(c) actions for statutory damages and that such analogues were actions at law, it is not surprising that an analysis of the nature of the remedy provided by Section 504(c) confirms that the remedy assessed in this case—an award of $8,800,000 in damages following a finding of willful infringement—cannot be considered "equitable" in nature.

As this Court has explained, "an action for money damages was 'the traditional form of relief offered in the courts of law.' " *Terry*, 494 U.S. at 570-571 (quoting *Curtis*, 415 U.S. at 196). Thus, the Court will find an "exception to the

general rule" that such an action is triable to a jury only if the damages have the "attributes" of an equitable remedy. *Id.* The Court has identified only two such instances: purely restitutionary actions, such as actions for disgorgement of improper profits, and monetary awards that are " 'incidental to or intertwined with injunctive relief.' " *Id.* (*quoting Tull*, 481 U.S. at 424). As explained below, statutory damages under Section 504(c) bear no resemblance to these equitable remedies. Rather, they are designed to accomplish two objectives—compensation and punishment—both of which are classic goals of legal remedies.

1. The statutory damages provisions of the early copyright statutes were characterized as forfeitures or penalties. *See* Act of May 31, 1790, ch. 15, § 2, 1st Cong., 2d Sess., 1 Stat. 124, 125 ("every such offender or offenders shall also forfeit and pay the sum of fifty cents for every sheet"); 8 Anne ch. 19 (1710) ("every offender or offenders, shall forfeit one penny for every sheet"); *Bolles* v. *Outing Co.*, 175 U.S. 262, 264 (1899) (provision establishing fixed amount of statutory damages is "clearly a penal statute"); *Backus* v. *Gould*, 48 U.S. (7 How.) 798, 811 (1849) (same); *Stevens*, 58 U.S. (17 How.) at 454 (same). It was in part because courts of equity would not enforce penalties or forfeitures that such statutory damages could only be awarded by a jury through an action at law. *Id. See Jones* v. *Guaranty & Indem. Co.*, 101 U.S. (11 Otto) 622, 628 (1879) ("A court of equity abhors forfeitures, and will not lend its aid to enforce them.").

Even these early statutes, however, were not exclusively penal but also were designed in part to provide a statutory measure of *compensation* to the copyright holder—akin to liquidated damages—in an area where actual damages were considered difficult to prove. *See Dwight* v. *Appleton*, 8 F. Cas. 183, 186 (S.D.N.Y. 1843) ("though these acts are penal, yet they are remedial also, and made in favor of the aggrieved party, and to secure his rights, and the forfeiture goes in part to him") (Thompson, J.). The Statute of Anne, for example, was enacted in response to complaints that at common law

> a bookseller can recover no more costs than he can prove damage: but it is impossible for him to prove the tenth, nay perhaps the hundredth part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many different hands all over the kingdom, and he not be able to prove the sale of ten. [*Millar*, 4 Burr. at 2318, 98 Eng. Rep. at 209 (Willes, J.).]

See also id. at 2351, 98 Eng. Rep. at 227 (Aston, J.). Statutory damages under the Statute of Anne—which we have shown were enforceable only in courts of law—were thus intended to provide an adequate remedy at law, not to supplement a legal remedy with an equitable one.[21]

Statutory damages under Section 504(c) are likewise designed in part to compensate the copyright holder, a fact made clear when Congress began moving away from damages set at fixed amounts and toward a range of amounts. In *Brady*, *supra*, the Court held that Section 4966 of the Revised Statutes (a predecessor to Section 504(c)) was "not a penal statute," because it was intended to provide "full compensation" to the copyright holder. 175 U.S. at 153, 154. As the Court explained:

> In the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open to a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to the damages suffered by the wrongful act. [*Id.* at 154.]

The Court also emphasized that, unlike earlier statutes which awarded part of the recovery to the government, under Section 4966 "[t]he whole recovery is given to the proprietor." *Id.* Thus, "[a]lthough punishment, in a certain and very

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21 As explained below, *see infra* at 36, there is no question that statutory damages under Section 504(c) are likewise intended to supply an additional legal remedy, as they are awarded solely at the election of the copyright owner and not just when it is determined that an adequate legal remedy is lacking.

limited sense, may be the result of the statute," its "chief purpose" is "the award of damages to the party who had sustained them * * * ." *Id.* at 157.

The dual purposes of statutory damages—compensation and punishment—are confirmed in the Court's decisions construing Section 25(b) of the Copyright Act of 1909, the direct predecessor to Section 504(c). As noted in *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935), Section 25(b) was intended "to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." More recently, however, the Court has made clear that "[t]he statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct." *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).[22]

The Copyright Act of 1976, which eliminated the proviso in Section 25(b) that statutory damages "shall not be regarded as a penalty," Act of Mar. 4, 1909, 60th Cong., 2d Sess., ch. 320, § 25(b), 35 Stat. 1075, 1081, and established for the first time enhanced damages for willful infringement, likewise makes clear that Section 504(c) is intended, in part, to serve a punitive and deterrent function in addition to providing compensation. *See also* S. Rep. No. 352, 100th Cong., 2d Sess. 47 (1988) (statutory damages amounts increased in 1988 "to retain the deterrent effect against potential infringers

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22 In *F.W. Woolworth*, the Court referred to the exercise of "judicial discretion," 344 U.S. at 232, 234, and in *Douglas*, the Court noted that "[t]he trial judge may allow [statutory] damages as he deems to be just." 294 U.S. at 210. In those cases, however, there is no indication that any party ever sought a jury trial, and the Court did not address any jury trial issues. *See Cass County*, 88 F.3d at 642 n.4, 643 n.5 (references to trial judge in *F.W. Woolworth* and *Douglas* were *dicta*). In fact, in *Douglas*, the Court stated that "the law commits to *the trier of facts*, within the named limits, discretion to apply the measure furnished by the statute," which could refer to either the judge or the jury. 294 U.S. at 210 (emphasis supplied).

that Congress intended to create in the 1976 copyright revision"); *Cass County*, 88 F.3d at 643 ("[I]t is plain that another role has emerged for statutory damages in copyright infringement cases: that of a punitive sanction on infringers, and the award of punitive damages traditionally is a jury function.").

Thus, statutory damages are intended, in a single award, to serve both the function of actual damages—compensation—and the function of punitive damages—deterrence and punishment. And as the Court has made clear, "actual and punitive damages * * * is the traditional form of relief offered in the courts of law." *Curtis*, 415 U.S. at 196. *See also Tull*, 481 U.S. at 422 ("Remedies intended to punish culpable individuals * * * were issued by courts of law, not courts of equity."). The fundamentally legal nature of such damages is not altered merely because Congress decided to address compensatory and punitive objectives through a single award, rather than though separate awards as is commonly done today.[23]

2. The only aspect of statutory damages that even arguably implicates equitable concerns is the consideration of the profits earned by the infringer as one possible factor out of many bearing on the amount of the award.[24] Yet as this case amply demonstrates, an award of statutory damages under Section 504(c) need bear no relation whatsoever to any

[23] Indeed, under the early English practice, the jury would award a single amount without distinguishing between these two types of damages. *See, e.g.*, *Wilkes* v. *Wood*, Lofft. 1, 19, 98 Eng. Rep. 489, 499 (K.B. 1763).

[24] The factors to be considered in determining the amount of statutory damages include the amount lost by the owner, the expenses saved and profit earned by the infringer, willfulness or innocence, estimated licensing fees, deterrent effects, and the conduct and attitude of the parties. *See F.W. Woolworth*, 344 U.S. at 233; *Warner Bros., Inc.* v. *Dae Rim Trading, Inc.*, 877 F.2d 1120 (2d Cir. 1989); *Fitzgerald Publ'g Co.* v. *Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986); *Marvin Music Co.* v. *BHC Ltd. Partnership*, 830 F. Supp. 651, 656 (D. Mass. 1993); 2 William F. Patry, *Copyright Law and Practice* 1172-73 (1994).

profits earned by the infringer. *See F.W. Woolworth*, 344 U.S. at 232 ("the court's choice between a computed measure of damage and that imputed by statute cannot be controlled by the infringer's admission of his profits which might be greatly exceeded by the damage inflicted"). Here, the trial judge awarded Columbia $8,800,000 in damages notwithstanding evidence that Feltner's stations earned no profit at all from their airing of the shows at issue. *See* Transcript of March 15-16, 1994 Trial ("Tr.") at 89-90, 130-131, 186, 222 (R. 281, 283). Such an award is in no way equitable "restitution." *See Tull*, 481 U.S. at 483 (The "authorization of punishment to further retribution and deterrence clearly evidences that this subsection reflects more than a concern to provide equitable relief. * * * [T]he District Court intended not simply to disgorge profits but also to impose punishment.").

Moreover, even if an award under Section 504(c) necessarily included an amount for profits earned by the infringer (which it does not), that would still not justify denying a jury trial. The Seventh Amendment guarantees the right to a jury in all cases except " 'those where equitable rights *alone* were recognized.' " *Granfinanciera*, 492 U.S. at 41 (quoting *Parsons*, 28 U.S. (3 Pet.) at 447) (emphasis supplied). Damages of the type awarded here could not be awarded by a court of equity. Historically, courts of equity could award an "accounting" of profits in copyright infringement cases, as an adjunct to their jurisdiction to award injunctive relief. In such cases, however, "[t]he Court of Equity * * * does not give anything beyond the account * * *." *Colburn* v. *Simms*, 2 Hare 543, 560, 67 Eng. Rep. 224, 231 (1843). Thus, in a copyright action seeking an accounting of profits, a court of equity could not award anything beyond the profits gained by the infringer.[25]

[25] *See Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940) (award of profits in equity was intended "not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim 'that which, *ex aequo et bono*, is theirs, *and nothing beyond this*' ") (citation omitted; emphasis supplied); *Livingston* v. *Woodworth*, 56 U.S. (15 How.) 546, 560

In any event, even if Columbia had sought to characterize its demand as one only for an "accounting" of profits—which it did not do—such a characterization could not succeed in abrogating Feltner's Seventh Amendment right to a jury trial. In *Dairy Queen*, a plaintiff sought to characterize a claim for damages for trademark infringement as a request for an equitable accounting. Noting that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings," the Court held that such a claim was in fact a legal claim triable to a jury because the plaintiff had not shown that it had no adequate remedy at law. *Dairy Queen*, 369 U.S. at 477-478, 479. So too here. Indeed, statutory damages under Section 504(c)—unlike equitable relief—are not awarded only where a trial judge finds that the plaintiff lacks an adequate remedy at law, as shown by the fact that the plaintiff may elect either actual or statutory damages at its sole discretion. *See Video Views*, 925 F.2d at 1015 ("The availability of statutory damages is premised on a far less demanding standard than the 'inadequacy of an adequate remedy at law' standard; it is premised simply on the copyright owner's election, for whatever reason.").

3. In no sense can the award at issue here be considered " 'incidental to or intertwined with injunctive relief,' " so as to make the remedy inherently equitable. *Terry*, 494 U.S. at 571 (citation omitted). An award of damages is not considered equitable under the Seventh Amendment if the plaintiff is "free to seek an equitable remedy in addition to, or independent of, legal relief," and the right to a jury " 'cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.' " *Tull*, 481 U.S. at 425 (quoting *Curtis*, 425 U.S. at 196 n.11). *See also Beacon Theatres*, *supra*; *Dairy Queen*, 369 U.S. at 478. Statutory damages under Section 504(c) are not "intertwined" with injunctive

(1853) (in patent infringement case, court of equity could not award amount greater than actual profits; if plaintiffs desired punitive damages, they could have sought them in court of law).

relief, but are awarded separately under a separate statutory provision.[26]

C. The Right To A Jury Determination Extends To All Issues Pertaining To The Imposition Of Statutory Damages Under Section 504(c)

After determining that a claim would have been triable before courts of law prior to ratification of the Seventh Amendment, the Court has also inquired whether particular issues within that action must be tried to a jury. *See Markman*, 116 S. Ct. at 1389; *Tull*, 481 U.S. at 426. The general question is whether a jury decision with respect to a particular issue is required to " preserve 'the substance of the common-law right of trial by jury.' " *Markman*, 116 U.S. at 1390 (quoting *Tull*, 481 U.S. at 426) (emphasis removed). As this Court explained in *Colgrove* v. *Battin*, 413 U.S. 149 (1973), "our decisions have defined the jury right preserved in cases covered by the Amendment, as 'the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure.' " *Id.* at 156 (quoting *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935)).

Because infringement in this case was decided on summary judgment,[27] only three issues remained for the trial: (1) the

[26] Nor could the staggering award of $8,800,000—and a potential award of $44,000,000—be considered "incidental" to any request for equitable relief, even if that question were relevant to the Seventh Amendment inquiry after *Beacon Theatres* and *Dairy Queen*. Indeed, Columbia did not even secure an injunction in this case. *See Cass County*, 88 F.3d at 643 ("[A] prayer for damages in the amount of $5000 per infringement for four infringements—$20,000, a substantial amount—indicates to us that the [plaintiffs] did not seek these statutory damages as 'incidental' to any other relief.").

[27] Had the question of infringement remained, there would be no doubt that the jury would have decided that question, as was historically done in infringement actions tried at law. *See, e.g.*, *Blunt* v. *Patten*, 3 F. Cas. 763, 765 (S.D.N.Y. 1828) ("[I]t is a proper question for the jury, whether the one is a copy of the other or not"); *Sayre* v. *Moore*, 1 East 360, 362 (K.B. 1785) (charging

number of infringements; (2) whether the infringement was willful, innocent, or neither; and (3) the amount of the damages.[28] As explained below, the Seventh Amendment requires that a jury decide each of these issues. A determination of whether damages should be set at $800, $44,000,000, or somewhere in between—the range at issue in this case based on the factual findings concerning the number of infringements and the defendant's willfulness or innocence—is, from the perspective of the substance of the right to trial by jury, at least as important as the determination of whether the defendant is liable in the first place. A determination that the defendant is liable for $44,000,000 rather than $800 can hardly be characterized as a "mere matter[ ] of form or procedure," *Colgrove*, 413 U.S. at 156 (quotation omitted), and the right to trial by jury in damages actions between private parties would be a flimsy "guard against judicial

jury that "if you think [defendant's work] is a mere servile imitation, and pirated from the other, you will find for the plaintiffs").

[28] *See* Tr. at 7 ("The only issues to be tried in this case, as the court understands, is how many infringements were involved, and were they willful, and what should the damages be.") (R. 281). At trial, the District Court declined to hear additional testimony on issues relating to the number of infringements, apparently basing its findings on evidence previously submitted. *Id.* at 10. Columbia has argued that Feltner is not entitled to a jury trial on the issue of the number of infringements in any event, but it appears that the Court of Appeals considered this to be a question of fact. The District Court, in its judgment after trial, made findings that "each episode constitutes a separate work for purposes of computing statutory copyright damages" and that the same episodes broadcast by different stations controlled by Feltner were separate acts of infringement. Pet. App. 22a. As to the latter finding, the Court of Appeals held that Feltner had "failed to demonstrate that the finding was erroneous," *id.* 15a, rejecting Feltner's contention that a contrary finding should have followed from admissions made by Columbia in its complaint. And as to the finding that each episode was a separate work, the Court of Appeals stated the legal standard as whether each episode "'has an independent economic value'" and could "'live [its] own copyright life.'" *Id.* 16a (citations omitted). The court then affirmed the District Court's findings on these questions, holding that the "evidence support[ed]" the District Court's conclusions. *Id.* 17a.

bias," *Davis* v. *Omitowoju*, 883 F.2d 1155, 1165 (3d Cir. 1989)—hardly worth the energy the Framers expended in extolling it, let alone winning it—if it did not extend to such a determination.

1. Number of Infringements

There can be little doubt that the purely factual question of the number of infringements was historically tried to the jury in actions seeking damages for copyright infringement. There appears to be no pre-1791 authority directly addressing this question.[29] Subsequent precedents, however—tolerably close to the time of the adoption of the Seventh Amendment—demonstrate that where statutory damages for copyright infringement were tried to a jury, the question of the number of infringements (under the early statutes, the number of sheets found in the defendant's possession) was for the jury to decide. *See Backus* v. *Gould*, 48 U.S. (7 How.) 798, 811-812 (1849); *Reed* v. *Carusi*, 20 F. Cas. 431, 432 (D. Md. 1845) ("If the jury find the defendant liable, they will find the number of copies caused to be printed for sale by him * * * and find the debt at the rate of one dollar for each sheet * * *.") (Taney, J.); *Millett* v. *Snowden*, 17 F. Cas. 374, 375 (S.D.N.Y 1844) ("The jury, if they consider that defendant has republished without leave obtained in writing, must

[29] In addition to the general paucity of reported opinions in that era, the absence of pre-1791 authority directly on point may be because copyright plaintiffs generally did not elect to proceed with a case for statutory damages after securing an injunction, due to the low level of such damages and the relatively cumbersome processes for obtaining them in an action at law. *See* Harry Ransom, *The First Copyright Statute: An Essay on An Act for the Encouragement of Learning, 1710* at 105 (1956) ("From the start the penalties [under the Statute of Anne] were judged not to be worth the expense or risks of a trial at common law."). Indeed, even though plaintiffs could generally seek an "accounting" as an adjunct to injunctive relief in Chancery, "[f]ew bills against pirates of books [were] ever brought to a hearing. If the defendant acquiesces under the injunction, it is seldom worth the plaintiff's while to proceed for an account; the sale of the edition being stopped." *Millar*, 4 Burr. at 2325, 98 Eng. Rep. at 213 (Willes, J.).

proceed to ascertain the number of sheets proved to have been sold, or offered for sale * * * and return a verdict of one dollar for each sheet"); *Dwight* v. *Appleton*, 8 F. Cas. 183, 185 (S.D.N.Y. 1843) (judge instructed jury "to find * * * how many volumes were imported, sold or exposed for sale by the defendants") (Thompson, J.). There is no reason to believe that any of these precedents constituted a departure from prior practice. *See Markman*, 116 S. Ct. at 1392 (inferring prior practice from later precedents).

2. Willfulness and Innocence

The Copyright Act of 1976 established different ranges of statutory damages for willful and innocent infringements. Thus, in this case, the trial judge made a factual finding of willfulness that increased the maximum allowable statutory damages fivefold, from $20,000 per work infringed to $100,000. The judge refused to make a factual finding of innocent infringement, which would have lowered the minimum statutory damages from $500 to $200. Because the early copyright statutes did not have different ranges of damages depending on the conduct of the defendant, there is no direct historical precedent on whether the issues of willfulness or innocence would have been decided by a judge or jury in a copyright action tried at law in the 18th century. Given the historical practice in analogous cases, however, it is unthinkable that such basic factual issues affecting the amount of damages to be awarded would have been decided by a judge.

At common law, it was always the province of the jury to find the facts on which a plaintiff's claim rested. *See Dimick*, 293 U.S. at 486. Whether a defendant acted willfully or innocently is a quintessential example of such a jury issue. *See, e.g., Sparf* v. *United States*, 156 U.S. 51, 94 (1895) (in 18th century homicide prosecutions, question of willfulness was " 'the proper and only province of the jury' ") (citation omitted). Perhaps the closest analogy at common law to a claim for willful infringement under Section 504(c) is a claim for punitive damages, which likewise turns in part on whether a defendant's actions were willful or unintentional. It is

beyond dispute that, in claims for punitive damages tried at common law, the question of willfulness or its absence (like all other questions pertaining to the imposition of punitive damages) was for the jury, not the judge. *See, e.g., Milwaukee & St. Paul Ry.* v. *Arms*, 91 U.S. (1 Otto) 489, 493 (1875); *Wilkes* v. *Wood*, Lofft. at 19, 98 Eng. Rep. at 498-499. There is no reason to adopt a different rule under Section 504(c).

3. Amount of Damages

The Seventh Amendment also requires that the jury, not the judge, determine the amount of the damages assessed under Section 504(c) if either party so demands. Rendering damage awards was a fundamental role of the jury at common law. *See Lord Townshend* v. *Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677) ("[B]y the law the jury are the judges of damages") (North, C.J.); *Cass County*, 88 F.3d at 642 ("the assessment of money damages by a jury is a fundamental component of common-law trial by jury"). In fact, one of the motivations for the Seventh Amendment was the attempt of the colonial governor of New York in 1764 to "re-examine the *facts* and re-consider the *damages*" that had been found by a jury in a case—an attempt that produced "a flame of patriotic and successful opposition, that will not be easily forgotten." Letters of Centinel, *in* 2 Herbert J. Storing, *The Complete Anti-Federalist* 149 (1981) (emphases in original).

For these reasons, this Court, in one of its earliest Seventh Amendment decisions, confirmed that a jury must determine the amount of damages under a statutory claim tried in a court of law. In *Bank of Hamilton* v. *Dudley's Lessee*, 27 U.S. (2 Pet.) 492 (1829), the Court considered a claim under a statute which provided that certain tenants could not be evicted until they had been compensated for the value of improvements made to the land, but which further provided that the amount of such compensation was to be determined by commissioners appointed by the court. *Id.* at 525. The Court, in a unanimous opinion by Chief Justice Marshall, held that because the case was a "suit at common law," the Seventh Amendment required that a jury, not court-appointed

commissioners, determine the amount of compensation. *Id.* As Marshall explained, after quoting the Seventh Amendment, "[t]he compensation for improvements is an important part of [the controversy], and if that is to be determined at common law, it must be submitted to a jury." *Id.*[30]

This appreciation that the Seventh Amendment protection extends to the assessment of damages explains this Court's opinion in *Dimick*, *supra*. There, the Court held that the Seventh Amendment prevents a trial judge from ordering an additur under any circumstances, and allows the judge to order a remittitur only if the plaintiff is given the option of a new trial. The Court's reasoning was clear. Under the English practice prior to the ratification of the Seventh Amendment (except in certain limited situations such as actions for mayhem), a party was " 'not to be put off by the Court saying that it will form its opinion as to the proper sum to be awarded,' " but rather was " 'entitled to an assessment by a jury which acts properly.' " 293 U.S. at 482 (citation omitted). Thus, allowing the practice of additur would "bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication," and would result in an award made " 'partly by a tribunal which has no power to assess.' " *Id.* at 487 (citation omitted). This Court has thus recognized that "the constitutional right * * * to a jury trial" extends to the determination of the amount of damages. *See also Kennon* v. *Gilmer*, 131 U.S. 22, 29-30 (1889).

Copyright cases were not an exception to this rule. As explained above (*see supra* at 24-30), copyright infringement actions seeking statutory damages (as well as those seeking actual damages) historically were tried before courts of law.

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[30] *See also McKinnon* v. *City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("The Seventh Amendment reserves the determination of damages, in jury trials within its scope, to the jury.") (Posner, C.J.); *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 44 (3d Cir. 1944) ("The guarantee of the Seventh Amendment * * * extends to the award of damages, since at common law the amount of damages was for the jury.").

Not surprisingly, then, available evidence indicates that it was juries, not judges, that assessed the damages prior to the merger of law and equity. *See Backus*, 48 U.S. (7 How.) at 802 (jury awarded statutory damages of $2,069.75); *Reed*, 20 F. Cas. at 432 (jury awarded statutory damages of $200); *Millett*, 17 F. Cas. at 375 (jury awarded statutory damages of $625); *Dwight*, 8 F. Cas. at 185 (jury awarded statutory damages of $2000); *Hudson & Goodwin*, 1 Root at 134 (jury awarded statutory damages of £100 under Connecticut copyright statute of 1783).

Nor is there any reason to believe that law-court judges would have assumed the fundamental role of assessing damages under a statute authorizing an award from within a range of amounts, as does Section 504(c). In fact, there is even more reason to believe that juries, not judges, would have assessed damages in such situation, for it was precisely when the assessment of damages required an exercise of discretion that juries were deemed indispensable. As this Court held in *Dimick*, "the common law rule as it existed at the time of the adoption of the Constitution" was that " 'in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.' " 293 U.S. at 480 (citation omitted). *See Barry* v. *Edmunds*, 116 U.S. 550, 565 (1886) ("[W]here no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.").

It was thus the fundamental role of the jury to determine uncertain damages, and this was so regardless of whether the damages were intended as compensation for inherently unquantifiable injuries (such as pain and suffering or damage to reputation)[31] or as punitive damages. As the Court explained with respect to punitive damages in *Missouri Pac. Ry.* v. *Humes*, 115 U.S. 512, 521 (1885), "the discretion of

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[31] *See Scott* v. *Shepard*, 2 Wils. 403, 95 Eng. Rep. 1124 (K.B. 1773) (upholding jury award of damages for pain and suffering); *Lord Townshend*, *supra* (upholding jury award for damages for defamation).

the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *See Barry*, 116 U.S. at 565 (Where plaintiff seeks punitive damages, it is impermissible "for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award.").[32]

As explained above, damages under Section 504(c) serve essentially the same role as common-law awards of compensatory and punitive damages. *See supra* at 30-34. They are intended to compensate the copyright holder as well as to punish and deter, and, like compensatory and punitive damages (in their traditional form), are paid entirely to the plaintiff. In such circumstances, historical practice compels the conclusion that such damages would have been assessed by juries in pre-merger actions tried in courts of law.[33]

[32] *See also Tull*, 481 U.S. at 428 ("[P]unitive damages are assessed by a jury when liability is determined in that fashion.") (Scalia, J., dissenting); *Wilkes*, Lofft at 19, 98 Eng. Rep. at 498-499 (same); *Huckle* v. *Money*, 2 Wils. 206, 206-207, 95 Eng. Rep. 768, 768-769 (K.B. 1763) (court refused to "intermeddle" in jury's award of punitive damages because "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending on a vast variety of causes, facts, and circumstances").

[33] For all these reasons, there can be no contention that the awarding of statutory damages under Section 504(c) is beyond "the practical abilities and limitations of juries," an additional factor the Court has considered in the Seventh Amendment inquiry. *Ross* v. *Bernhard*, 396 U.S. at 538 n.10. *See Granfinanciera*, 492 U.S. at 42 n.4; *Tull*, 481 U.S. at 418 n.4; *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454-455 (1977). As shown, juries have routinely awarded discretionary damages (under proper instructions and subject to appropriate judicial review) since long before ratification of the Seventh Amendment.

This case is therefore unlike the question before the Court with respect to the amount of penalties payable to the government in *Tull*. In that case, the Court created a limited exception to the general rule that legal damages are to be assessed by a jury, in circumstances where the government seeks to enforce civil penalties to further a complex regulatory scheme.[34] Thus, the dissent in that case characterized the Court as having made an "exception" to the jury's fundamental role in assessing damages in cases "where the Government is imposing a noncompensatory remedy to enforce direct exercise of its regulatory authority." 481 U.S. at 428 (Scalia, J., dissenting). While the Court in *Tull* did not explain the historical analogy on which this part of its decision rested, the Court apparently analogized the imposition of civil penalties under the Clean Water Act payable to the government to "the role of the sentencing judge in a criminal proceeding." *Id.*[35]

This case, by contrast, involves sums intended to serve the traditional function of compensatory and punitive damages. They are paid directly to the plaintiff, not the government. Nor is there any indication, as in *Tull*, that Congress specifi-

[34] The Court's discussion of this issue in *Tull* was in fact *dicta* because, in light of the Court's reversal of the lower court's liability determination, any discussion of the role of the judge in assessing damages was not essential to the Court's disposition of the case.

[35] The Court in *Tull* also noted that it "ha[d] been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial." 481 U.S. at 426 n.7. The lack of such evidence before the Court may have been attributable to the fact that the briefing in the case focused almost exclusively on the right to a jury trial on the issue of liability, with almost no attention paid to the question of such a right with respect to the amount of any penalty. As noted, the reversal on liability made it unnecessary to address the latter issue. The authorities set forth above, including most prominently this Court's opinion in *Dimick*, make quite clear that preservation of the jury's traditional role in assessing damages is in fact a critical component of the Seventh Amendment right, at least with respect to damages actions between private parties.

cally intended for statutory damages to be assessed by judges in order to help implement a complex regulatory scheme, *id.* at 425—and every reason to conclude that it did not, *see supra* at 10-21. In another context, the Court has stressed that, under early English practice, "the dichotomy between fines and damages was clear," and that punitive damages paid to an injured party were never considered analogous to civil fines of the sort at issue in *Tull*. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 265 n.7 & 264-277 (1991). That distinction applies as well under the Seventh Amendment. Whatever the permissible role for judges in assessing quasi-criminal fines paid solely to the government under environmental statutes, there is no precedent for usurping the traditional role of the jury in assessing the damages paid to a prevailing private party at issue here. *See* Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 209-212 (1991).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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